

**For discussion on
22 January 2013**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Proposed Creation of one Supernumerary Post of
Deputy Principal Government Counsel
in the Civil Division of the Department of Justice**

PURPOSE

This paper invites Members' views on the proposed creation of a supernumerary post of Deputy Principal Government Counsel (DPGC)(DL2) in the Civil Division (CD) of the Department of Justice (DoJ) for a period of two years from 1 April 2013 to 31 March 2015 to take forward the work required in the promotion and development of mediation in Hong Kong.

JUSTIFICATION

Need for a DPGC post to continue to support the work on promotion and development of mediation

2. Mediation is a dispute resolution process conducted in private by an impartial individual (the mediator) who is engaged by the parties by consent to facilitate and assist the parties in arriving at a settlement of their dispute. The mediator does not adjudicate on the dispute. The mediator helps the parties identify what really matters in the dispute to the parties and generates options to resolve the dispute for the parties' consideration.

3. In Hong Kong, the use of mediation is not entirely new. It has been commonly used in settling disputes arising from, for example, construction contracts and family matters. In February 2009, the Judiciary promulgated the Practice Direction 31 on Mediation, which came into effect in January 2010. Pursuant to the Practice Direction, parties to litigation

proceedings to which the Practice Direction applies will have to consider using mediation to resolve their disputes. Thus, mediation has further established itself as a form of dispute resolution in Hong Kong.

4. DoJ has over the years been taking measures for the promotion and development of mediation in Hong Kong through the Working Group on Mediation (Working Group)¹ and the Mediation Task Force (Task Force)² chaired by the Secretary for Justice (SJ). The progress on the promotion of mediation is summarised in the paper entitled “Mediation” issued for discussion by the Panel on Administration of Justice and Legal Services on 22 January 2013.

5. Upon completion of the work of the Task Force, to continue with the efforts to foster the development of mediation in Hong Kong, SJ has set up a new Steering Committee on Mediation (Steering Committee) in November 2012. The terms of reference of the Steering Committee are set out in **Annex A**.

6. The key role of the Steering Committee is to advise SJ on and assist in the further promotion and facilitation of the wider use of mediation to resolve disputes in Hong Kong. For this purpose, the emphasis of the work of the Steering Committee and its three Sub-committees is on the monitoring of the operation of the new Mediation Ordinance (Cap. 620) which provides a regulatory framework for mediation, monitoring the accreditation and training of mediators, as well as implementation of ongoing and new publicity initiatives. In particular, the Steering Committee will advise on issues arising from the implementation of the Ordinance and make recommendations on follow-up actions; consider and advise on the developments in the accreditation and training of mediators; as well as seek to enhance public knowledge of mediation as a means to resolve disputes. To facilitate the work of the Steering Committee and the three Sub-committees, a lot of legal and policy researches and liaison work will have to be done. Besides, some of the legal issues involved will be complex and require extensive comparative studies. Taking into account the complexity and volume of work ahead, there is a need to create a

¹ The Working Group was set up in 2008 to examine the development of the use of mediation in Hong Kong and make recommendations on how to facilitate and encourage its wider use.

² The Task Force was set up in December 2010 to implement the recommendations as published in the Report of the Working Group on Mediation in February 2010.

dedicated DPGC post in CD to provide secretariat and research support to the Steering Committee and its Sub-committees, and to work with other Government bureaux/departments and relevant stakeholders in the promotion of mediation. Details of the work involved and the assistance and support required from the proposed DPGC post in respect of these areas of work are set out in the ensuing paragraphs.

Operation of the Mediation Ordinance (Cap. 620)

7. The Mediation Ordinance (the Ordinance) was enacted in June 2012 and came into operation on 1 January 2013. The Ordinance provides a regulatory framework for major aspects of mediation such as confidentiality and admissibility of evidence.

8. The Steering Committee and its Regulatory Framework Sub-committee will monitor the implementation of the Ordinance and advise on issues arising therefrom, including but not limited to –

- (a) ***Proposing guidelines on the exemption for disclosure of mediation communications for research, evaluation or educational purposes under section 8(2)(e)³ of the Ordinance*** – During the Bills Committee stage of the Mediation Bill, Members of the Bills Committee expressed concern that mediation communications might be disclosed unwarrantedly and untimely through publications for research, evaluation or educational purposes. They were worried that the identities of parties to mediation would be revealed and it might generate negative impact on the parties concerned.

It was thus suggested that, after enactment of the mediation legislation, guidelines may be provided to assist mediators and researchers proposing to use mediation communications for research, evaluation or educational purposes to comply with section 8(2)(e). The Regulatory Framework Sub-committee will follow up on the formulation of the proposed guidelines.

³ Section 8(2)(e) of the Ordinance provides for disclosure of mediation communication if “the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates”.

- (b) ***Monitoring the actual working of the exceptions to disclosure of mediation communications*** – This is to consider whether it is necessary to streamline the procedure for applying to courts for disclosure of mediation communications or its admission in evidence, and whether there is abuse of the provisions relating to disclosure of mediation communications, and if so, how to prevent such abuse.
- (c) ***Monitoring the operation of the Ordinance in practice and areas not yet covered by the Ordinance*** – The adequacy of the Ordinance would be reviewed (1) by seeing how it operates in practice; and (2) in addition to reported cases, by making use of empirical data collected from research in considering necessary or desirable amendments to the Ordinance.
- (d) ***Considering whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement*** – This is one of the recommendations of the Working Group to be followed up. Apology legislation exists in some other jurisdictions, and is particularly relevant in disputes such as medical negligence. The legal issues involved will be complex and thorough comparative studies need to be conducted.

Dedicated support from the proposed DPGC is required to work with relevant stakeholders for the monitoring work mentioned above as well as to advise on issues arising therefrom. The proposed DPGC will work closely with Members of the Steering Committee and the Regulatory Framework Sub-committee in examining and reviewing the above issues. As stated above, detailed studies and research on complex issues will need to be conducted by the proposed DPGC, either working with the Members or through others.

Accreditation and training of mediators in Hong Kong

9. The quality of mediators is crucial in maintaining public confidence in the mediation process. Accreditation and training, in turn, are important to ensure the good quality of mediators. The Hong Kong Mediation Accreditation Association Limited (HKMAAL) was thus established in August 2012 with a view to becoming the premier

accreditation body for mediators in Hong Kong, discharging accreditation and disciplinary functions and setting standards for training.

10. While HKMAAL operates independently as a single non-statutory industry-led body working on its accreditation system, the Administration, through the Steering Committee and its Accreditation Sub-committee, will continue to monitor the accreditation and training of mediators of Hong Kong, keeping in view future developments, such as the existence of competition in the provision of mediation services.

11. In the longer term, the Steering Committee will also consider whether a statutory accreditation body should be set up to replace HKMAAL, and if so, when such body should be set up and what changes should be made to the Ordinance.

12. The proposed DPGC will work with all relevant stakeholders in monitoring the development of accreditation and training of mediators in Hong Kong, and will keep the Steering Committee and its Accreditation Sub-committee informed of any issues that may arise, and provide views and recommendations on how to deal with the issues. To perform the tasks, the proposed DPGC will undertake research and provide reports to facilitate the consideration by the Steering Committee and its Accreditation Sub-committee, with reference to overseas and local experience.

Implementation of public education and publicity initiatives

13. The Public Education and Publicity Sub-committee will continue to implement, in collaboration with the Judiciary, other government departments, organisations, stakeholders and the community, the on-going and new publicity initiatives.

14. Such initiatives include –

- (a) production of posters, a second Announcement in the Public Interest and a docu-drama, educating the public on the roles and responsibilities of parties to a dispute in mediation;
- (b) identification of community or other venues for mediation;

- (c) promotion of the “Mediate First” Pledge in the commercial sector;
- (d) exploring opportunities for initiating pilot mediation schemes in different sectors; and
- (e) organisation of training, conferences and seminars on mediation.

15. Dedicated support of the proposed DPGC is essential to the formulation and implementation of these publicity initiatives. The proposed DPGC will work closely with members of the Public Education and Publicity Sub-committee, stakeholders and other relevant parties in formulating and implementing the various initiatives. For example, support from the proposed DPGC is required to gather ideas about the theme and main message for promotion, identify the channels and platform for implementation, and work closely with the parties concerned during the implementation process, ensuring that the work is done properly and that the schedule would be met. Heavy involvement of the proposed DPGC is required in monitoring each of the publicity initiatives, evaluating its effectiveness and in reporting to the Steering Committee and its Public Education and Publicity Sub-committee.

16. The proposed DPGC will also work with relevant parties from different sectors, including the Government departments concerned, in considering and advising on the merits of proposals for new mediation pilot schemes (e.g. pilot scheme in relation to using mediation to resolve disputes involving building management cases), assist in formulating such schemes, provide advice on the resources required and work with mediation service providers.

17. With the knowledge gained from the experience in undertaking the various initiatives and pilot schemes, the proposed DPGC will review the development of mediation services, identify the areas that require improvement and prepare the necessary reports.

Promotion of mediation within the Administration

18. As DoJ promotes the wider use of mediation in Hong Kong, it is necessary to ensure that mediation will also be used by the Administration. Given that mediation is a relatively new concept for most bureaux and

departments, an officer at a senior level with the requisite expertise and experience in mediation will be required to explain to and impress on bureaux/departments the benefits and advantages in terms of time and cost effectiveness in using mediation to resolve disputes. The proposed DPGC will liaise with bureaux/departments, possibly directly with officers at the senior level, to provide tailored-made briefings and training as appropriate and required, for their staff. Seminars and training courses will also be organised for officers at the directorate level to help them understand what mediation is and what it can achieve, so as to assist them in formulating relevant policies for more proactive use of mediation to resolve disputes. The proposed DPGC, who will keep abreast of the latest developments in mediation in the international arena and provide timely updates on mediation information, together with advice and support in the use of mediation in specific cases, will also devise and provide training programmes for officers in DoJ and law-related officers of other Government departments.

Proposed creation of the DPGC post

19. To take forward the heavy and extensive duties set out in paragraphs 6 to 18 above, a dedicated officer at the DPGC level is essential. The areas of work involved are specialised and the issues to be dealt with are complex, and can be sensitive if they touch on vested interests of stakeholders. The subject officer will work closely with stakeholders and other people and bodies from different sectors, including the Judiciary, other government departments, the mediation community and the academia, often at professional and senior levels. We consider therefore that the incumbent should be mature, professionally competent with appropriate knowledge and experience, possess management skills and be able to work independently under pressure and minimal supervision. Given such requirements, the position should appropriately be pitched at DPGC level. Given that there are a number of areas of work and tasks to be handled and taking into account the nature of work and the anticipated progress of the development of mediation, we propose that the position should be created for two years and a review on the further need for the post will be conducted in due course.

——— 20. The job description of the proposed post is at **Annex B**. The
——— organisation chart of CD showing the proposed post is at **Annex C**.

Interim staffing arrangements

21. To provide the necessary support to the Task Force, a three-year non-civil service (NCS) DPGC position was created in September 2010 with the approval of the Finance Committee in June 2010 vide EC(2010-11)6. The officer filling the position (who was recruited through an open recruitment exercise) subsequently left the Department in early 2012 and no suitable candidate was identified through another open recruitment exercise. In order not to delay the outstanding tasks that need to be followed up (such as organising the “Mediate First” conference, handling questions of the LegCo Bills Committee on the Mediation Bill, facilitating the establishment of HKMAAL, taking steps to prepare for the commencement of the Mediation Ordinance and applying for extension of the use of community venue for mediation), as an interim staffing arrangement, a six-month supernumerary DPGC post was created under delegated authority for the period from 18 June to 17 December 2012 to provide the required staffing support for handling the mediation-related work and the post was filled by an SGC on an acting basis, working under the supervision of a Principal Government Counsel (PGC). Apart from the six-month DPGC mentioned above, a Government Counsel on non-civil service contract terms was also engaged in the same period to provide support in this regard.

22. After the lapse of the supernumerary DPGC post, as an interim arrangement, the mediation related work is handled by a counsel at the Senior Government Counsel (SGC) level under the supervision of the PGC. We aim to seek the approval from the Finance Committee for the proposed creation of the supernumerary DPGC post for two years as soon as possible as the current level of work requires the dedicated commitment of a counsel at DPGC level. The NCS DPGC position created in September 2010 will lapse upon the creation of the DPGC post.

Other supporting staff

23. To ensure that there is sufficient manpower to support the mediation-related work, two time-limited posts, comprising one SGC post and one Personal Secretary I (PS I) post, will be created for the period from 1 April 2013 to 31 March 2015 to tie in with the tenure of the proposed supernumerary DPGC post.

Alternatives explored

24. We have considered alternative staff redeployment other than the creation of the DPGC post but found that not feasible.

25. At present, the Law Officer (Civil Law) (LO(C)) (DL6) is supported by four PGC (DL3). The four PGC oversee the operation of their respective units which, in turn, comprise 12 teams each of which is headed by a DPGC and a team headed by an Assistant Principal Government Counsel (DL1).

26. CD represents the Government in the conduct of all legal claims and disputes involving Government and provides legal advice on civil matters to all Government bureaux and departments. Each DPGC is responsible for supervising a team of counsel in the conduct of cases or advisory matters under the purview of his/her team in specific areas of work. All DPGC in CD are tasked with, and fully tied up with, their respective directorate supervision, management functions and professional work, and it would not be feasible to deploy another DPGC to take up the work on top of his/her current duties without adversely affecting the discharge of their duties and compromising the quality of work.

27. Separately, noting that a PGC is currently supervising the work on mediation in addition to his current duties, we have also considered the viability for the PGC, to be supported by an SGC, to take up the duties of the proposed DPGC post. This however is not practicable, given that the PGC is already heavily occupied with other aspects of his work. It is thus essential to create the DPGC post for handling the work concerned.

FINANCIAL IMPLICATIONS

28. The proposed creation of the DPGC post in DoJ will bring about an additional notional annual salary cost at mid-point of \$1,696,200. The full annual average staff cost, including salaries and on-cost, is \$2,383,000. In addition, this proposal will necessitate the creation of one SGC post and one PS I post, at a notional annual mid-point salary cost of \$1,468,320. The full annual average staff cost, including salaries and staff on-cost, is \$2,171,000. We will include the necessary provision in the draft Estimates of 2013-14 and 2014-15 to meet the cost of the proposal.

ADVICE SOUGHT

29. Members are invited to comment on the proposal. Subject to Members' support, we will seek the recommendation of the Establishment Subcommittee in January 2013 and approval from the Finance Committee in March 2013.

Department of Justice
January 2013

Steering Committee on Mediation

Terms of Reference

The terms of reference of the Steering Committee on Mediation are as follows:-

To advise on and assist in the further promotion and development of mediation in Hong Kong, including but not limited to –

- (a) monitoring the implementation of the Mediation Ordinance, and advising on issues arising therefrom;
- (b) monitoring matters concerning the accreditation and regulation of mediators in Hong Kong, including such matters as may arise from the organisation and operation of the Hong Kong Mediation Accreditation Association Limited, and advising on issues arising therefrom;
- (c) considering and advising on ongoing and new initiatives for the promotion and development of mediation;
- (d) conducting such studies, reviews or researches relating to mediation (whether by its own members or through others) as may be required; and
- (e) such matters as may be incidental to the matters stated in (a)-(d) above.

Job Description
Deputy Principal Government Counsel (Mediation)

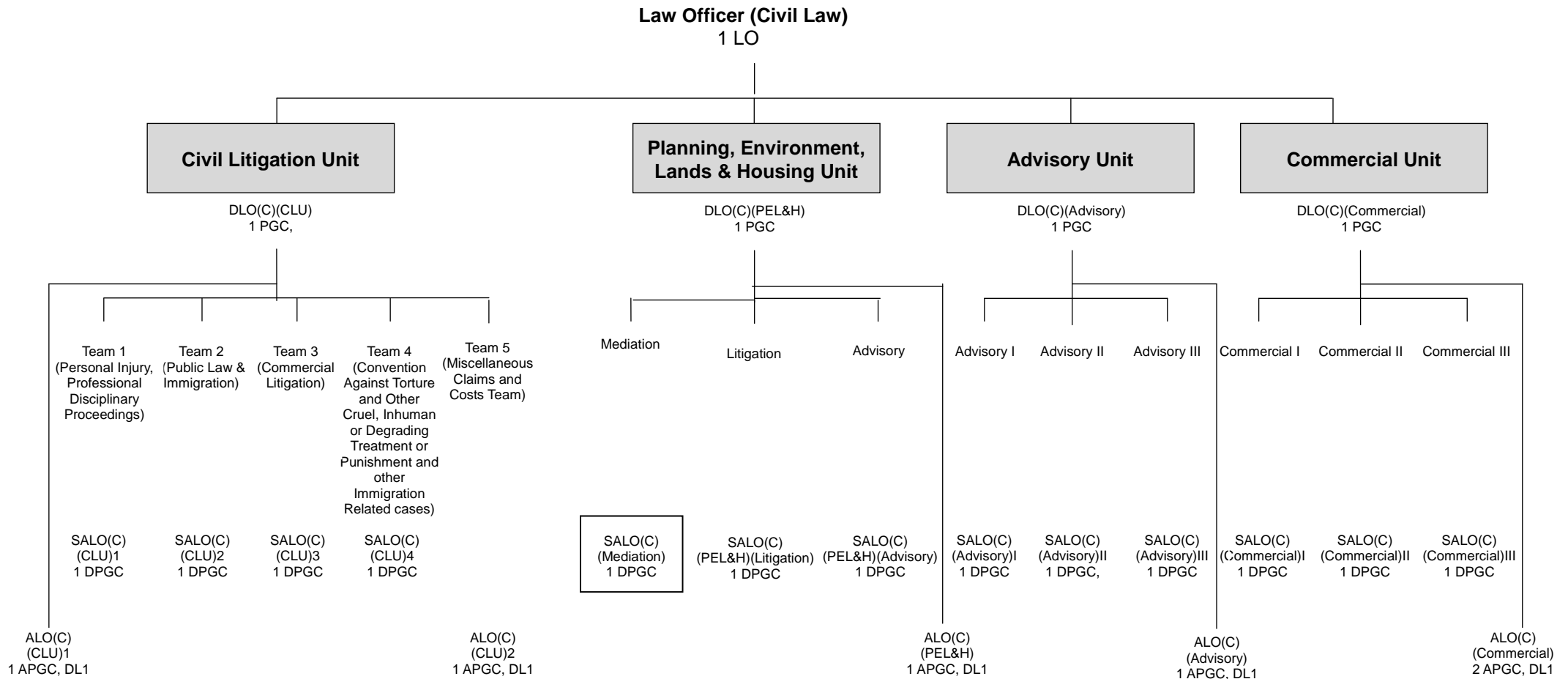
Rank : Deputy Principal Government Counsel (DL2)

Responsible to : Deputy Law Officer (Civil Law)

Main duties and responsibilities

1. To provide secretariat and research support to the Steering Committee on Mediation and its three Sub-committees, including but not limited to the following –
 - (a) working with relevant stakeholders to monitor the implementation of the Mediation Ordinance (Cap. 620) and advising on issues arising therefrom, as well as considering the need for an Apology legislation;
 - (b) working with stakeholders to keep in view and monitor the development of the system of accrediting mediators;
 - (c) working with relevant parties to consider and advise on ongoing and new initiatives for the promotion and development of mediation in Hong Kong; and
 - (d) working with relevant parties for initiating pilot mediation schemes in different sectors.
2. To advise on and assist in the promotion of the more extensive use of mediation in Hong Kong as appropriate.
3. To provide support and advice as appropriate to Counsel of the Department of Justice on the use of mediation.
4. To liaise with other Government bureaux/departments for the provision of appropriate briefings and training for their officers for the promotion of more extensive use of mediation to resolve disputes involving the Government.
5. To undertake such other duties as may be assigned from time to time.

Existing and Proposed Organisation Chart of the Civil Division



- Legend:
- LO = Law Officer (DL6)
 - PGC = Principal Government Counsel (DL3)
 - DPGC = Deputy Principal Government Counsel (DL2)
 - APGC = Assistant Principal Government Counsel (DL1)
 - DLO(C) = Deputy Law Officer (Civil Law)
 - SALO(C) = Senior Assistant Law Officer (Civil Law)
 - ALO(C) = Assistant Law Officer (Civil Law)
 - CLU = Civil Litigation Unit
 - PEL&H = Planning, Environment, Lands and Housing
 - = Proposed DPGC post